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KC

THE KING'S COUNSEL

MAGAZINE

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A LIVING TRIBUTE TO HER GRACIOUS MAJESTY QUEEN ELIZABETH II

For the kind attention of Sir Edward Young, The Private Secretary to Her Gracious Majesty Queen Elizabeth II. We would be grateful if you would please bring to the attention of Her Gracious Majesty the birth of a new law Magazine titled - KC The King's Counsel. The Magazine is registered and published in Sri Lanka.

Your Gracious Majesty, We have pleasure in introducing to your gracious majesty the first publication of the Law Magazine - KC The King's Counsel. The Magazine is dedicated to promoting and nurturing the English Law which has been the guiding principle of the common law as practiced in most of the common law countries for centuries. Your Gracious Majesty is the external manifestation of the edifice of the English legal system and the legal values that have been imparted to the world. These values are still developed, shared and cherished by such a vast majority of countries worldwide.

We thought we should offer your gracious majesty a living tribute by dedicating this first edition to mark the 70th anniversary of your gracious majesty's accession to the throne. Your gracious majesty has demonstrated leadership in an exemplary manner consistent with the dignity, decency and devotion as Queen and Head of the Commonwealth. There have been many controversies but your gracious majesty has been able to dilute such controversies because of the exemplary leadership qualities demonstrated by your gracious majesty - worth emulating by those who hold the public office. The remark in your gracious majesty's Accession Day message 'I was blessed that in Prince Philip I had a partner willing to carry out the role of consort and unselfishly make the sacrifices that go with it. It is a role I saw my own mother perform during my father's reign' was very touching.

We take this opportunity to wish your gracious majesty our sincere appreciation for your gracious majesty's contribution to the advancement of the humanity, and being at the helm of the great edifice of the British Empire and the immense goodwill your gracious majesty has shown for so many people not only in UK but across the word.

Srinath Fernando,
LLM (UK), LLM (Colombo)
Editor-In-Chief / Publisher
01st July 2022

THE BIRTH OF A NEW LAW MAGAZINE - KC THE KING'S COUNSEL

London is still the global capital for banking and financial services. It is also an international capital in many respects partly because of the unique system of laws and conventions that govern the country and the acceptance of English law principles as the driving force for executing commercial contracts. The importance of English law need not be elaborated because it is transparent and predictable. It provides freedom of contract and its a pro-business approach is unparalleled. The judge made law otherwise known as the British common law system is still being respected by the U.S jurists and the British Commonwealth. The importance of London being a center for international arbitration is yet another landmark. The laws of the United States are largely derived or rather influenced by the English common law system, at both the federal and state levels, although it has significantly deviated from its English ancestor both in terms of form, substance and procedure. The U.S. jurisprudence is now increasingly being relied upon by the judiciary of the British Commonwealth. The legal thoughts are peddled back into the original land from which they emanated at first.

There is a solid respect for UK judicial independence which it had inherited from the time Parliament gained its shared sovereignty with the King along with the House of Commons, House of Lords during the 17th century. The meticulous selection process and the impartiality, experience and learning of English law judges, along with their skills in dispensing justice are rooted in judicial independence. There has never been any serious misdemeanor of Judges who have been empowered to decide cases according to their own judgment of the issues, without outside influence and government control. Even the issue surrounding the *Pinochet* case, where a spouse of a Judge had had

dealing with the petitioner, too had been taken seriously by the UK judiciary and the issue was resolved through yet another decision on the same issue by a different bench. This demonstrated the resilience of the British justice system.

We believe this Magazine could provide a new forum for the development of English law across the Commonwealth countries where English law precedents and jurisprudence is widely used. The legal practitioners are most welcome to express their opinions in this Magazine. Let this Magazine bring together the legal practitioners from across the Commonwealth. The pages of the Magazine are wide open for the advancement of your profession.

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LLM (UK), LLM (Colombo)
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INTERVIEW- Advocate Yoav Harris on Shipping and Maritime Law

Adv. John Harris established the legal firm of Harris & Co. in 1977. The firm is dedicated to the practice of Maritime and Admiralty Law including ship-arrests, charter party disputes, cargo claims, sale and purchase of ships and the financing of ship purchases, arbitration and commercial litigation. The firm receives "top tier" ratings from *Chambers & Partners*, *The Legal 500*, *Dun & Bradstreet* and *BdiCoface*. The firm receives instructions from the foremost shipping and maritime law departments of international law firms and keeps abreast of English and other jurisdictions' maritime law judgments and publications. In the non-litigation aspect of the practice the firm provides legal advice relating to the various contracts of carriage and attends to matters relating to the sale and purchase of ships and the financing of ship purchases. The firm is the editor of the Israeli chapter for "Shipping" both at the shiparrested.com guide of "Ship arrest at Practice" and of Chambers and Partners, and of Legal 500, ICLG, The Shipping Law Review, Mondaq, guides. Also, Adv Yoav Harris and Adv. John Harris are the editors of Chambers International Global Practice guides for the years 2021, 2022. According to the latest Chambers ranking the firm "*has significant litigious capabilities*", has "*an internationally respected offering*" and "*also notably active in ship arrests*".

Adv. Yoav Harris contributes articles to the Israeli monthly magazine "The Cargo"; Additional articles of Adv. Harris relating to International and Maritime Law were published, by way of introductory – in The Marker magazine "British settlement-can it be"?; issue 15 of Shiparrested.com "The Naval Prize Court"; issue 23 "Against the Ship" or "Rooted in Personal liability" The Maritime Lien Vs. The Owners"; issue 33 – "The Hamas/Israel Conflict, is it an "Act of War"? ; issue 34-"On Barratry and Exceptions of Owners Liability"; special edition-"The Grounding of MV Ever Given in the Suez Canal-Beginning of the Legal Voyage". Yoav's articles regarding the Haifa Maritime Court's authority to act as a Prize Court, were cited both by the Maritime Court (claim in rem 26861-08-13) and the Supreme Court (Civil Appeal 7307/14) when deciding on the matter of M/V Estelle.

The AAL Magazine: Advocate Yoav Harris, thank you for having consented to an interview with our Magazine as we believe that you could throw some light on the strategic importance of the Suez Canal and legal pitfalls the shipping lines might fall into as had been the case with MV *Ever*

Given. You have had years of exposure, experience and education having been the Managing Partner of a leading legal firm in Israel. You have inherited this legacy from your father Advocate John Harris who has been in legal practice since 1977 and built up the legal firm Harris and Company. Could you please explain to us the legal authority of the operation of Suez Canal and the manner in which shipping lines could be prosecuted while passing through the Suez Canal?

Adv. Harris: Thank you for your warm welcome, it is my pleasure being with you. I think we are dealing with quite a tricky situation. In fact, ship owners and operators have no commercial alternative but to navigate through the Suez Canal, bearing in mind that the alternative of navigating around African shores and the Cape of Good Hope is not only more expensive in terms of fuel and operation costs and time required, but also exposes the vessel to more perils of the sea and adding more costs to the marine adventure. We can see that on one hand on its welcome announcement of completing the widening the canal project the Suez Canal Authority ("SCA") published it is able of accommodating 100% of the worlds' fully loaded container ships fleet, but on the other hand when such a loaded container ship grounded in the Canal while being under SCA's compulsory pilotage, SCA detained the vessel and claimed not less than U.S $ 900 million, such amount was comprised from alleged loss of revenue of US$ 12-15 million for every day of the grounding and US$ 300 million for "salvage bonus" and US$ 300 million for "loss of reputation" (although as mentioned above, shipowners and operators have no alternative but to navigate through the Canal). This detention and claim of the SCA was fully supported by the Egyptian court of Ismailia. Which means that in fact, when crossing the Suez Canal the shipping lines should 'expect the unexpected as they can be prosecuted by the SCA for any alleged violation of the SCA's rules, or alleged damage caused to the either any of the Canal's harbors, docks or navigations ways, and/or alleged commercial damages such as losses of income and loss of reputation as been illustrated in the matter of MV Ever Given.

The AAL Magazine: As you are aware the recent incident involving MV *Ever Given* blocked the Suez Canal for around a week or so which resulted in delays in shipment of goods and potential damage to goods or the ship itself. Some reports indicated that ship had also damaged the canal and dredging had to be done. This incident also delayed hundreds of other ships that could not navigate through and some ships had to be re-routed around the Horn of Africa. Who should be held accountable? Has there been negligence on the part of the Suez Canal Authority or was it on the part of the Captain of the vessel or both parties.

Adv. Harris: According to the insights we received from Captain Herzel Dadu when we investigated this matter, who is a former master of "Zim integrated Shipping Services", and who navigated through the Suez Canal on more than 100 voyages, the recommended speed of navigating in the Canal is 7.5 knots. If the vessel will move slower, it will lose its steering capabilities. Rows of 8 containers, piled all along 400 meters length of the vessel- as the MV Ever Given was loaded, might operate as a huge sail when hit by wind and could effect the position of the vessel and in addition, wind storms may also influence visibility. Therefore, under conditions of forecasted storms it is preferable to have the bow thruster in a "stand- by" position so it could be immediately operated and stabilize the vessel when hit by wind. In addition, the

master should be on-guard and alert to maintain the vessels' speed of 7.5 knots and to increase speed when required and if the vessel is slowed by the winds, in order to maintain its maneuvering capabilities. To the best of our knowledge, up to date no formal report that details on the sequence of events and the circumstances and reasons which led to the grounding has been published, although "grounding" is a "marine casualty" according to IMO's Code of the International Standards and Recommended Practices for a Safety Investigations into a Marine Casualty or Marine Incident and as such it should have been investigated and the reasons for this marine casualty ("what happened and "why did it happen" and "what can we learn" in order to avoid further such marine accidents and casualties, should have been published in IMO's reports, under which matters of groundings are classified as "Very serious casualty". It is also worth mentioning in this regard, that the SCA's officials had full access to the vessel Voyage Date Recorder of the vessel and as mentioned previously they have detained the vessel and boarded two of the SCA's pilots on the vessel under a compulsory pilotage according to Article 6 (1) of the SCA's Rules of Navigation. Therefore, we can't tell precisely who's fault was it that caused the grounding. But considering the fact that the SCA's allowed the entry of the vessel to the Canal being perfectly aware of its size and its container loaded situation and of the forecasted wind and send storms and that the vessel was under compulsory pilotage it might have been that the SCA "played" a significant role in the events or omissions or failures which led to the grounding. However, from the pure legal point of view, the legal concept is that even compulsory pilotage does not exonerate the master and the crew from the proper observance of the duty and it is the duty of the master to observe the conduct of the pilot and in case of palpable incompetency to interpose his authority for the preservation of the property of his employers.

The AAL Magazine: What advice would you give to shipping lines on mitigating risks while passing through Suez?

Adv. Harris: It seems, that in fact, there is nothing that much can be done. As mentioned above the alternative of by passing the Canal will be more expensive and will expose the marine adventure to more perils. It seems that the shipping lines should double check that at the beginning of the voyage the vessel is seaworthy and properly manned and equipped as required by the Hague-Visby Rules, Article III, and in such a case they could try to rely on any of the relevant exemptions from liability which might be either "Act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or the management of the ship", the "Arrest or restraint of princes, rulers or people, or seizure under legal process" or "Any other cause arising without the actual fault or privity of the carrier" as provided under Article III 2 (a), (g) and (q) of the Hague-Visby Rules.

In addition, shipping lines should make sure they have got their proper insurance coverage including insurance against piracy, as it might be that the above mentioned acts of detention of the vessel followed by a claim for amounts that can be considered as excessive amounts, can be considered as acts of piracy and the payments paid for the release of the MV Ever Given in consideration of the SCA's claim can be considered as ransom payments. In addition shipping lines should be well prepared to declare General Average as we understand was done by the Owners and operators of the MV Ever given and should be familiar with the

possibility to limit liability by opening a limitation found following the International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships, Brussels, 10 October 1957 and its Amending Protocol of 21 December 1979. They should also make sure that the relevant commercial documents such as the Bills of Lading and the Charter party would include a law and jurisdiction clause referring to English Law and courts/ arbitration which is a favorable jurisdiction to both enforce laws and rules which exempt or limit shipowners liability and also to issue the relevant orders against proceedings which might be commenced against owners or shipping lines in other jurisdictions (which are less favourable to owners).

The AAL Magazine: I feel that the Suez Canal operations must be closely monitored and supervised by an international organization as it has a direct impact on the global trade. Would you advocate an international committee on the efficacy of operating the Suez Canal? Or should there be an international recognized and monitored specialized certificate for Suez operations that would provide an added feature to the importance of operating Suez. How would you respond to this?

Adv. Harris: I do agree with you. As matter of fact, under Article 1 of the Convention of Constantinople dated October 1888 "The Suez Maritime Canal shall always be free and of commerce or of war, without distinction of flag. Consequently, the High contracting parties to the convention agree not in any way to interfere with the free use of the Canal, in time of war as in time of peace." However, the Khedivate of Egypt, through whose territory the Canal ran and to whom all shares of the Suez Canal Company were due to revert when the company's 99 years to manage the Canal would have expired was not invited to participate in the negotiations and did not sign the Convention of Constantinople. In the year 1956 following the hostilities which took place between France the United Kingdom, the State of Israel and Egypt, after Egypt under the presidency of Gamal Abdel Nasser nationalized the Canal, and after Egypt blocked the Canal, under U.S pressure, France, the U.k and Israel have withdrawn and after the UN declared the Canal is a property of Egypt.

It is also worth mentioning that in clause 5 of the peace treaty between Israel and Egypt it was stated that the Israeli vessels and cargos destinated to Israel or arriving from Israel will enjoy the right of free passage in the Suez Canal, on the basis of the Convention of Constantinople dated October 1888 "which applies to all nations". This declaration, together with right of innocent passage provided by Article 17 of the UN Convention on the Law of the Sea, which according to "[...] ships of all States enjoy the right of innocent passage through the territorial sea, might give rise to an arguments that according to international law the right for free and innocent passage in the Canal should be available to all vessels even though the Canal belongs to Egypt and is part of its territorial sea and therefore, if this freedom of navigation is interrupted by a groundless detention of a vessel and an excessive claim against its owners, the conduct of the SCA should be monitored internationally. For example, by an establishment of a Panel by the UN which will investigate the matter of the Ever Given and the SCA's conduct and will provide a report which will include both its findings and its recommendations. Such a Panel of Inquiry was established by the UN's Secretary-General, for the inquiry on the 31 May 2010 Flotilla Incident – the flotilla of six vessels which departed from

Turkey and were taken over by the Israeli defense forces due to their declared attempt to break the Naval blockade declared and notified by the Israeli forces of the Gaza shore- which was found in the Panel's report as legal. At the end of the day, it eventuated that the Panels' recommendations on the manner in which Israel and Turkey will bring the matter to end and resume their relationship was in fact accepted by both parties.

Coming back to the Suez Canal it seems that although there might be some UN-IMO tools of better investigating the incident of the MV Ever Given and the manner in which the Suez Canal Authority operates in general, from realistic geo-politic points of view, I can hardly see how Egypt will allow such investigation to take place which would be considered as an interference with its own national property. One should also bear in mind that at the end of the day, it seems that the economic power is within the hands of Egypt, because as mentioned before, commercially-globally speaking, shipping lines have no alternative but to use the Suez Canal.

The AAL Magazine: Should there be a new regime on marine insurance especially for Suez operations.

Adv. Harris: I think that the well -known insurance concept of "piracy' should be interpreted as also including an incident where a vessel is detained by the SCA and Egyptian Courts for securing excessive amounts of claims which are claimed with so little foundation which would imply that the payments paid in order to release such a vessel from its detention are to be considered as ransom payments. In this regards it might be worth while to adopt the The Evangelismos tests for a wrongful arrest of a ship, according to, when an action was so unwarrantably brought, or brought with so little colour, or so little foundation, that it rather implies malice on the part of the Plaintiff or that gross negligence, which is equivalent, than the Plaintiff will be obliged to pay the shipowners compensation for the ship owners' damage resulting from the detention of the vessel due to its' arrest by a maritime court which eventually it was a wrongful arrest.

The AAL Magazine: Do you think Marine salvage and commercial operators could come to the aid of vessels in distress within the area of sea under Egyptian sovereignty as such international conventions might not be sufficient to deal with this scenario. How adequate are laws governing marine salvage in terms of operating under Suez Canal theater of operations.

Adv. Harris: The International Convention on Salvage 1989, clearly state that "This convention will not affect any provisions of national law of any international convention relating to salvage operations by or under the control of public authorities" (Article 5. 1) and also that "Nothing in this Convention shall effect the right of the coastal State concerned to take measures in accordance with generally recognized principles of international law to protect its coast line or related interest from pollution or the threat of pollution following upon a marine casualty or acts relating to such a casualty [...], including the right of a coastal State to give directions in relation to salvage operations". Therefore, obviously the SCA and the Egyptian authorities are fully sovereign to conduct, manage and handle salvage operations relating for example to a grounding of a vessel (which is a marine casualty) in the Canal or at any territorial waters of Egypt (and even out-side the territorial waters if the marine casualty

might effect the Egyptian coastline). The "problem" is that when exercising its rights to get paid for the costs of the salvage which is a recognized maritime lien, the SCA might have been excessive in claiming US$ 300 million for a salvage bonus.

The AAL Magazine: As you are aware the legal proceedings were initiated in Egypt and Japanese owners commenced litigation of liability in the High Court in London and the Korean charter operator Evergreen has been named as parties by the owners. I can see a complete disarray of the legal proceedings as the facts are very sketchy on as to who was responsible for what. This involves damage to the vessel, damage to the cargo it was carrying, cost of refloating and salvage operation, financial loss incurred by the Suez Canal Authority, any damage to the Suez Canal itself, and whether it had any bearing on the other vessels which were also delayed and extra cost for taking Cape route. How would you appraise this situation in terms of the applicable maritime law?

Adv. Harris: According to the media coverage of the matter, the SCA detained the vessel after it was re-floated (on 29th March 2021) and initiated a arrest procedures before the court of Ismailia City, claiming the above-mentioned compensation of US$ 900 million. According to the courts order -ordering the arrest of the vessel, the Ever Given was to be held until the compensation amount is paid, according to the Egyptian Maritime Law. An appeal which as filed by the Owners' club - UK P&I CLUB was denied. At a later stage a settlement was reached between the vessel-interests and the SCA the details of which are confidential, and the vessel was released.

We ourselves are not aware of the particulars of the claims and proceedings which were further filed by any of the parties involved. However, under the presumption that the relevant commercial - legal documents which can be for example the bills of lading and the charterparty contain a law and jurisdiction clauses referring any dispute to English Law and courts or arbitration, it seems that the relevant and competent Courts and arbitration institutes would be "full" with claims which might be related to many aspects of maritime law: Seaworthiness and pilotage, limitations and exempts of liabilities, marine insurance, salvage and general average, charter party disputes, etc. In a nutshell, it seems that insofar as owners will prove that they have provided a sea worthy vessel properly manned and equipped at the beginning of the voyage then they could argue for exemptions and limitation of liabilities and to recover salvage payments (under the assumption that the confidential settlement agreement with SCA provides a break down of the amounts paid for Salvage and other heads of claims) from the cargo interests. In addition, if and in as much that the SCA's detention of the vessel for excessive claimed amounts would be found to be as acts similar to piracy and the settlement payment as of the nature of ransom, it might be that additional amounts paid to the SCA under the confidential settlement agreement would also considered as "salvage payments" in addition to the payments which are so defined, in the settlement agreement itself. However, in order to conclude that the settlement payments are more of the nature of ransom, the reasons and the liabilities for the grounding have to be examined as would the amounts of damages, if any, caused to the SCA as a result of the grounding.

In relation to the SCA demands which were published, it seems that "damages for reputation" are remote from recovery both because shipping lines have no commercial choice but to use the Canal and they would continue and have continued to use it regardless of the grounding incident, and also because such an alleged damage is not a direct damage or expense, and usually indirect damages or losses are not covered according to the principles of maritime law.

The AAL Magazine: Could there be a criminal responsibility on the part of the Suez Canal Authority or on the Captain of the vessel, if so under what international convention this could be covered. What would have happened had there been a passenger ship.

Adv. Harris: According to the English Merchant Shipping (Distress Signals and Prevention of Collisions) Regulations 1996, when vessels do not comply with Rules 1 to 36 and Annexes I to III of the International Regulations for Preventing Collisions at Sea 1972 and its amendments, the owners of the vessel, the master and any person responsible for the conduct of the vessel shall each be guilty of the offence, punishable by imprisonment for a terms not exceeding two years and a fine (clause 6 of the regulations). Although the International Regulations relate to collisions and not to grounding, still, according to Rule 9 of the International Regulations (headed "Narrow channels"), "a vessel proceeding along the course of a narrow channel or fairway shall keep as near to the outer limits of the channel or fairway which lies on her starboard side as is safe and practicable, and also where other vessels may be obscured by an intervening obstruction shall navigate with particular alertness and caution and shall sound the appropriate signal. However, it is difficult to see how the above-mentioned International Regulations were indeed violated by the vessel prior to its grounding, and we are not aware of any criminal or similar proceedings being taken against the owners or the master of the Ever Given, and also not by the SCA.

The above-mentioned International Regulations apply to "all vessels" so in terms of (probable lack of) criminal liability, the results would be the same.

The AAL Magazine: Can you throw some light on how the general average contribution might work in this regard. Would the owners press on the cargo owners to contribute to the losses caused by the incident which entails a proportion from the owners as well?

Adv. Harris: The marine adventure is an adventure concerning three interests: the interest in the ship, those in the cargo and those in the freight remaining to be paid. Usually, the common principle is that any loss sustained by one of these interests must generally be borne by that interest itself, it lies where it has fallen- it is a particular average. But, when in order to avert a danger which threatens the whole marine adventure some interest is scarified (like throwing overboard of cargo, or cutting away masts for safety in a storm), the loss is imposed upon all for whose sacrifice has been made, in proportion to their saved value. It is a general average, derived from the ancient law of Rhodes and adopted in the Digest of Justinian. Therefore, when effectual assistance is given to the ship and cargo in time of danger, by "strangers" to the ship, they become entitled to salvage payments or rewards (which are recognized maritime liens, allowing the salvagers to arrest the vessel and sell it under a judicial sale by a

maritime court and to receive their payments from the selling of the vessel) and the salvage itself (which can be for example the towage of the vessel out of the position of danger) is considered as a general average loss or expenditure. Also, a payment for captors of the vessel to induce them to give up the ship and cargo is considered as a general average loss. Usually, the ship owners put in writing in the terms and conditions of the Bill of lading or the charter party their right to impose a possessory lien on the cargo (which is, after loading on the vessel, under their hands) to secure any amount due to them in relation to the carriage of the cargo in their vessel.

Therefore, the mechanism of the General Average should be relatively simple. Provided that the owners or carriers preserved their rights for a possessory liens on the cargoes carried, they should be provided by the cargo-interests with General Average bonds signed by a respected P&I Club or cargo insurer which guarantee for the owners the effecting of the salvage payments as would be eventually adjusted by the specialized adjustors under a legal-arbitral procedure, usually taking place in London. The principles of General Average have been codified in the "York-Antwerp Rules", promogulated by the "Comite' Maritime International" which is a non-governmental international organization whose object is to contribute to the unification of maritime law. Usually, the Bills of lading and the charter parties refer to The York-Antwerp Rules of 1994 and by their incorporation they bind the parties to the marine adventure and govern the general average matters.

The AAL Magazine: If I may take you to a precedent in a Panama Maritime Court where Panama Canal Authority was found guilty of negligence as there had been a human error on the part of the Pilot. How would Panama Canal Authority have dealt with this situation, had this incident taken place at Panama Canal? Of course Panama Canal is a freshwater lock system whereas Suez operates more on ocean tides. Is there a correlation of facts and circumstances?

Adv. Harris: The manner in which the canal operates -either as a freshwater lock system or on ocean tides is of less relevance. The importance is that a Panama Maritime Court was willing to accept the possibility that the Panama Canal Authority was negligent and impose on it tortious or other liability. This is a very interesting point because the Court of Ismailia acted totally different by ordering on the arrest of the Ever Given to secure a claim for US$ 900 million filed by the SCA, comprised also by US$ 300 million for "loss of reputation", without being provided, probably, with any material evidence relating
the SCA's role (by its compulsory pilots) in the grounding and to the claimed amounts. I will be happy to receive a copy of the Panama Maritime Courts judgment, it is very interesting.

The AAL Magazine: As regard the arrest of the *V Ever Given* by Egyptian Court, do you think this is an incident such a drastic action warranted. It further delayed the cargo operations. Do you think a new regime should be in place for future operations as no one is sure of the way how a similar situation would be dealt with by the Suez Canal Authority and the Laws of Egypt?

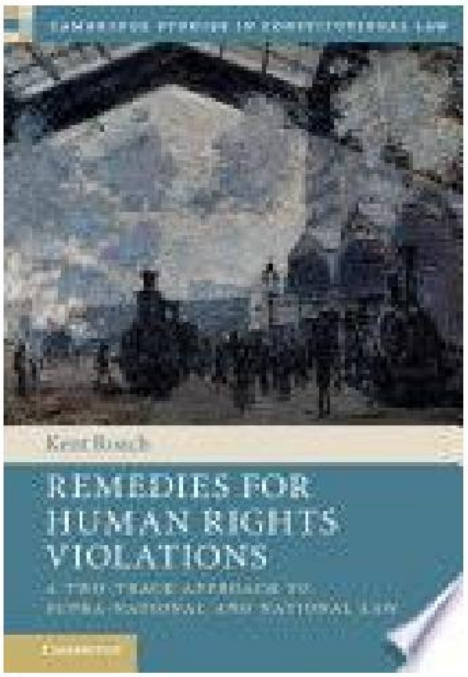
Adv. Harris: As discussed, there is a difference between "what should be" and "what there is" in relation to the conducts of the SCA, especially when comparing to the willingness of the Panama Maritime

Court to accept that the Panama Canal Authority was responsible for its' pilot's error. Therefore, it seems that the most available and practical solution would be that the parties to the marine adventure-owners, cargo interests and their insurers will recognize that the passing through the Suez Canal might result in a peril and might end with the capture of the vessel, and make the insurance arrangements, accordingly.

The AAL Magazine: Had there been an issue with the seaworthiness or total destruction of the ship for some unforeseen reason, what would have been the procedure for owners, charters, cargo owners, salvage operations and what action should Suez Canal Authority have taken to mitigate the risk.

Adv. Harris: Obviously if there would have been an issue with the seaworthiness of the vessel at the beginning of the voyage, then it would allow owners the possibility of exemption from liability and to claim a general average contribution. But, if unfortunately, the out-come of the grounding would be more dramatic then "only" the 6 days of the vessel being "trapped" in the Suez Canal, and for example would have resulted with damage to the vessel or the cargo or with the need to discharge the containers from the vessel in order to have it re-floated – a possibility that was considered and would have been must more costly considering the size of the vessel and the equipment required for such an operation, which obviously was not at hand and would mean that the vessel would have remined in its position much longer, until it would have been re-floated, then, obviously the volume of the relevant amounts -salvage costs, SCA's loss of income, damage to the vessel and cargo would be much more higher then the "modest" amount of US$ 900 million claimed by the SCA and eventually was settled, probably for less. However, the maritime-legal principles we have discussed, would have remained the same, meaning that if and as much the owners have complied with their duties relating to the beginning of the marine adventure, then matters of limitation of liability, insurance, general average, would apply. At the end of the day these ancient principles follow the marine adventures, up to date, reminding us all that with all modernity and even when dealing with a newly built, modern large container vessel, nevertheless, navigating a canal is a marine adventure subject to sand storms, winds and the human errors of pilots or others.

INTERVIEW- Prof. Kent Roach on his book Remedies for Human Rights Violations



Kent Roach is Professor of Law at the University of Toronto Faculty of Law. He is a graduate of the University of Toronto and of Yale, and a former law clerk to Justice Bertha Wilson of the Supreme Court of Canada. Professor Roach has been editor-in-chief of the *Criminal Law Quarterly* since 1998. In 2002, he was elected a Fellow of the Royal Society of Canada. In 2015, he was appointed a Member of the Order of Canada for his human rights advocacy as a lawyer and a scholar. In 2016, named (with Craig Forcese) one of the top 25 influential lawyers in Canada (change-maker category) by *Canadian Lawyer*. He was awarded the Molson Prize for the social sciences and humanities in 2017.

He is the author of 15 books including *Constitutional Remedies in Canada* (winner of the Owen best law book Prize); *Due Process and Victims' Rights* (short listed for the Donner Prize for public policy), *The Supreme Court on Trial* (same); (with Robert J. Sharpe) *Brian Dickson: A Judge's Journey* (winner of the Dafoe Prize) and *The 9/11 Effect: Comparative Counter-Terrorism* (winner of the Mundell Medal); (with Craig Forcese) *False Security: The Radicalization of Canadian Anti-Terrorism* (winner of the Canadian Law and Society Association best book prize) and *Canadian Justice, Indigenous Injustice: The Gerald Stanley/Colten Boushie Case* (short listed for the Shaughnessy Cohen prize for political writing.) He is the author of the Criminal Law and Charter volumes in Irwin Law's essentials of Canadian law series. His 15th book *Remedies for Violations of Human Rights: A Two-Track Approach to Supra-national and National Law* was published by Cambridge University

Press in 2021. He is the co-editor of 13 collections of essays and 3 casebooks including *Comparative Counter-Terrorism* published by Cambridge University Press in 2015. He has also written over 250 articles and chapters published in Australia, China, Hong Kong, India, Israel, Italy, Japan, Singapore, South Africa, the United Kingdom and the United States, as well as in Canada.

Professor Roach has served as research director for the Goudge Inquiry into Pediatric Forensic Pathology and for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182. In both capacities, he edited multiple volumes of research studies. He served on the research advisory committee for the inquiry into the rendition of Maher Arar and the Ipperwash Inquiry into the killing of Dudley George. He also served as volume lead for the Truth and Reconciliation Commission's Report on the Legacy of Residential Schools. He has been a member of Canadian Council of Academies expert panels on policing and subsequently on Indigenous policing. His most recent book is *Canadian Policing: Why and How it Must Change* (2022) He was research director for *Missing and Missed* (2021), Justice Gloria Epstein's report on the Toronto police's missing persons investigations and for *A Miscarriage of Justice Commission* (2021) a report by Justice Harry LaForme and Justice Juanita Westmoreland. Professor Roach has won awards for his pro bono work and contributions to civil liberties. He has represented Aboriginal and civil liberties groups in many interventions before the courts, including *Gladue*, *Wells*, *Ipeelee* and *Anderson* On sentencing Indigenous offenders, *Latimer* on mandatory minimum sentences, *Golden* on strip searches, *Khawaja* on the definition of terrorism, *Chouhan* on peremptory challenges *Corbiere* and *Sauve* on voting rights and *Stillman*, *Dunedin Construction*, *Ward*, *Conseil Francophone* and *G v. Ontario* on remedies for violations of the Canadian Charter of Rights and Freedoms.

The AAL Magazine: Prof Kent Roach, thank you for having consented to this interview. We are pleased to feature your latest book on *Remedies for Human Rights Violations* published by the Cambridge University Press. You have a distinguished academic career at the University of Toronto and have published a series of books on Canadian constitutional rights, and on anti-terrorist laws. You have won series of prizes for your books. Your book on *Remedies for Human Rights Violations* covers wide variety of issues in public law. Let me begin with a moral question on anti-terrorist laws as opposed to laws that strengthen civil liberties. Do you think terrorism or extreme violence is born out of injustice in society and if it is so what is justice and what is injustice. How do you quantify the something which cannot be measured? It is broadly a perception. Terrorism in one country could be to liberate one state from colonial past, yet in another country against oppression, yet another it could be for a religious freedom.

Prof. Roach: Thank you for interviewing me and for that question. It reminds me of what the late Nelson Mandela said when he received honorary Canadian citizenship shortly after the September 11, 2001 terrorist attacks on the United States: "you are a terrorist if you lose".

That said, I must with the greatest of respect for President Mandela disagree as a criminal law scholar. We do not allow

murder regardless of any motive. Although terrorism laws can be abused, I think a narrow and restrained definition and criminal prohibition of terrorism is defensible. In my book *The 9/11 Effect* (2011), I argued that the United Nations missed an opportunity to promote a restrained general definition in Security Council Resolution 1373 after 9/11. Article 2(1)(b) of the 1999 Terrorism Financing Convention limits terrorism to acts "intended to cause death or serious bodily injury to a civilian" when the act is designed "to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act." This allows for just wars (without war crimes) and it excludes civil disobedience targeting property and essential services.

But most terrorism laws are too broad. This position led me to act for a civil liberties organization that unsuccessfully challenged the political and religious motive requirement in Canada's terrorism law in *R. v. Khawaja* 2012 SCC 69. We also argued that the law was overbroad.

You are correct that much terrorism is motivated by real or perceived injustice and we cannot ignore such injustice. In some countries you may not need terrorism offences if regular criminal offences including laws against attempts and conspiracies are adequate. You also need democracy, federalism, human rights, rights for various minorities and effective remedies to help prevent unjust conditions that can led to terrorism. You also need transitional justice, prosecutorial discretion and truth and reconciliation commissions in countries with a history of political violence.

The AAL Magazine: As you are aware Professor, the Canadian Supreme Court has stated that creative exercise of remedial power under Canada's constitutional Charter of Rights should not be restricted by ordinary legislation however legislation is introduced once a policy has been accepted. So prior to legislation 'policy' is the breeding ground for rights violations? Is there a mechanism where policy - when it is under discussion or being officially accepted through White Papers - could be challenged before being made law?

Prof. Roach: In Canada, the Attorney General of Canada has started to issue public legal opinions about why a proposed piece of legislation is consistent with the Charter. The New Zealand Attorney General has done this much longer and has said that a significant amount of proposed bills are inconsistent with the New Zealand Bill of Rights. This strikes me as a good practice.I am also a fan of the UK's Joint Committee of Human Rights which also examines bills and conducts studies on compliance with human rights. I worked with a Commission of Inquiry in Canada that also proposed reforms to prevent the sharing of intelligence that could result or condone the use of torture. This responded to a deficiency that after 9/11, Canada shared intelligence with other countries more, but did not pay enough attention to the human rights records of the countries sending or receiving the intelligence. You also need a strong civil society and legislative process to limit risks of human violations. Legislative committees should pay attention to civil

society groups who express concerns about human rights violations by either the legislature or the executive. Indeed, the executive may be a greater threat to human rights than the legislature given that the executive can often violate human rights in secret. This is another reason why you need judges who are prepared to ensure effective remedies when human rights are violated.

The AAL Magazine: You have titled your book as two track approach to supranational and national law. Could you please explain to a non-Canadian as to what this is all about? Where do you derive this from Canadian jurisprudence?

Prof. Roach: The two-track approach actually finds it origins in international or supra-national law. Specifically in the distinction between specific measures (which provide a remedy that attempts to respond to the harms suffered by the litigant) and general measures (which are designed to prevent the repetition of similar human rights violations in the future). Because supra-national courts have limited resources, they have been more attentive than most domestic courts to preventing violations of human rights in the future. I argue in the book that litigants and then courts should be drive down both tracks- both specific or micro remedies and general or macro remedies. People expect courts to provide remedies for the harms unjustly suffered by the litigant. But courts also need to make sure that the state is taking steps to prevent similar human rights violations in the future. If courts fail to do this, I fear that specific measures will amount to little more than symbolic justice or a tax that the government must pay for violating human rights. This also responds to access to justice concerns. Most people whose human rights are violated will never be able or willing to take their case to court. They must depend on general measures that aim to prevent violations in the future.

The AAL Magazine: Professor, you have referred extensively to comparative jurisprudence on human rights especially from South American/ Inter-American Court of Human Rights. Why have you referred to comparative jurisprudence - is it because of diversity in South America or did you find that more issues are brought to the Courts for adjudication or did you find something which is a marked lacuna in the Canadian jurisprudence.

Prof. Roach: The Inter-American Court of Human Rights, along with the European Court of Human Rights, are the courts that are responsible for supervising human rights in much of the world. Hopefully, the African Court will soon be as important as the courts in San Jose and Strasbourg. Ideally, there should be courts in every region or even for the whole world. I am primarily a domestic Canadian lawyer, but I learned much in writing this book (over a decade I am afraid) about international law. I think many domestic lawyers- perhaps particularly in the Anglo-American world- disparage supra-national law especially when it comes to remedies. Following Blackstone and Dicey, Anglo-American lawyers tend to think, domestic law achieves effective remedies while international law does not. But international courts will consider apologies and restorative justice measures that can be important as an acknowledgment of a

wrong. Blackstone and Dicey were primarily concerned with damages and habeas corpus which are very important remedies that can be effective for individual litigants. But what about other people who are not able to litigate? The Inter-American Court of Human Rights has been particularly active with respect to police, prisons and the land and other rights of Indigenous peoples. It has experience in dealing with group rights. It recognizes that full justice cannot be achieved overnight by one remedy for one person. It often retains jurisdiction over a case and asks the governments to report back on what they have done. The parties and civil society groups can challenge what the government claims to do to comply with the judgment. The Inter-American Court has issued supplementary remedies as it becomes more educated about the problems. The Council of Ministers has started to do something similar in part to deal with the huge backlog in the European Court of Human Rights. International law is also appealing for a remedial standpoint because it is more willing to admit remedial failure. Remedies especially general measures to prevent human rights violations often fail. Has the exclusion of unconstitutionally obtained evidence made the American or Canadian police always respect human rights? No. But Anglo-American courts too often fail to admit failure. They just continue to issue more specific or individual remedies. They can afford to award repetitive individual remedies for repetitive individual violations. In contrast, supra-national courts often ask states to take more comprehensive measures including training the executive better to respect human rights. To be sure, this does always work, but it tries. Moreover, the courts will follow-up on their judgments by retaining jurisdiction. Supra-national courts will at first respect the ability of governments to reform their own agencies but they can become more prescriptive over time if human rights continue to be violated.

The AAL Magazine: Would you please elaborate on dialogic judicial review as you have referred to 'suspended declaration of invalidity' in Canada and South African and 'declaration of incompatibility' in New Zealand, UK and Australia.

Prof. Roach: Dialogic judicial review refers to the reality that neither the courts or the legislature necessarily have the final word on matters of human rights. In Canada and South Africa, courts have suspended declarations of invalidity in recognition that legislatures often can select from a variety of options that will comply with human rights. The Canadian Supreme Court in *Ontario v. G.* 2020 SCC 38 recently accepted arguments I have made both as a scholar and a lawyer representing an intervener that it can suspend a declaration to give the legislature an opportunity to reply with rights compliant legislation while also exempting the litigant from the law when necessary to provide an effective remedy for that person. In New Zealand, UK and Australia the courts cannot strike down a law and can only much like supra-national courts provide a declaration of incompatibility. This can place an issue of human rights on the legislative agenda and define it as a matter of human rights. In the UK, I have argued with an English colleague, Professor Jackie Hodgson, that the courts should have also provided prisoners with damages each

courts. Like the European and Inter-American Court of Human Rights, the Geneva Commission does issue both general and specific measures. Perhaps because they are not seen as a court countries including regrettably my own do not always comply with its remedies. For example, Michel Dumont has still not been compensated for being wrongfully convicted and Canada still does not have a system for compensating such persons. This is discussed in a recent report- *A Miscarriages of Justice Commission* (2021) at https://www.justice.gc.ca/eng/rp-pr/cj-jp/ccr-rc/mjc-cej/index.html by Justices LaForme and Westmoreland- Traoré for which I was research director.

The AAL Magazine: There has been criticism leveled at Canada at the UN and the Inter-American Commission on Human Right (IACHR), which conducted their own inquiries, for its inaction to address the disappearances and murders of Indigenous women and girls, and the neglect of their human rights. There have been calls, both the UN and the IAHCR, as well as indigenous communities and advocacy groups, for an inquiry. In December 2015, the Canadian government announced a national inquiry, suggesting a new recognition of the crisis. Why has there been a lethargic attitude on these types of issues when Canada has an excellent Charter of Rights. The Government is duty bound to look into all issues of discrimination. What's your take on this?

Prof. Roach: A Charter of Rights does not guarantee justice. Domestic courts sometimes fail and that is why we need supra-national courts. It is also why we need an active civil society and an independent media. Canada has indeed been to slow on justice with respect to Indigenous peoples. Hopefully things are changing but there will likely be continued failures and that is why an iterative approach is essential. I discuss remedies for violations of Indigenous rights in chapter 9 of *Remedies for Violations of Human Rights*. I argue that we need a full range of remedies including interim and pre-trial remedies to stop irreparable harm that is often caused by violations of Indigenous rights. We also need the humility to understand that no court can fully repair the harms of colonialism. Judicial remedies should not be a new form of colonialism in the form of judges know best. Following the United Nations Declaration on the Rights of Indigenous Peoples, part of the remedy should be allowing Indigenous community to exercise jurisdiction and to formulate their own laws.

The AAL Magazine: What is the extent of acceptance of EU jurisprudence in Canadian courts? Can you cite some cases where EU jurisprudence on Human Rights have been referred to or upheld in Canadian cases.

Prof. Roach: In the early years after the Charter was enacted in 1982, there was more reference to comparative and European caselaw than there is now. Some of this is to be expected because over 40 years, Canada has developed its own extensive jurisprudence. But I think we should be open to learning from all forms of comparative law and supra-national law. That is what I have tried to do in the book. A good example of such learning is that after

time they were denied the vote after the courts said that a ban on all prisoners voting was a disproportionate violation of human rights. Dialogic judicial review assumes a functioning democracy. It avoids the extremes of legislative or judicial supremacy. The Indigenous and civil liberties groups that I have worked with have recognized the reality that you need to fight in multiple institutions. You go to court when you cannot get your rights recognized by the legislature or the executive. At the same time. you often have to defend your rights and respond to victories or losses in the courts by lobbying the legislature and the executive. No one has the final word. Dialogic judicial review can also occur in the US but is more difficult given checks and balances and lack of party discipline. For example, Congress will be unlikely to respond to the overruling of *Roe v. Wade* though of course many states will reply by placing more restrictions on abortions. For better or worse, nothing is final. Indeed, I think it is something of a conceit that traditional Anglo-American lawyers value finality as much as they do. I have seen too many wrongful convictions to think courts always get it right.

The AAL Magazine: You have made extensive reference to New Zealand's Bill of Rights in your book, what really made you to compare New Zealand's Bill of Rights, What are the comparative advantages in the New Zealand Bill of Rights which you don't find in the Canadian Bill of Rights. Was this something to do with the attitude of the Supreme Court of New Zealand to Bill of Rights?

Prof. Roach: The New Zealand courts starting with Baigent's case were prepared to award significant remedies for rights violations. They also correctly in my view were prepared to reduce those damages if the state had taken reasonable measures to prevent similar rights violations in the future. More recently, the New Zealand courts have recognized the declaration of incompatibility in part because such a declaration may be relevant to international bodies. In my view this is preferable to the Australia High Court that has held that a declaration of incompatibility is a non-judicial remedy even when it was recognized in legislation. This has led to less awareness of human rights in Australia and feeds into hostility to international human rights adjudication. The Australian High Court in *Momcilovic* (2011) 245 CLR 1 has disparaged dialogue by putting it into scare quotes and by stressing that courts make final decisions.

The AAL Magazine: There been occasions of Canadian citizens approaching Geneva Human Rights Council when they find that all avenues within Canada are exhausted. How do you find this phenomenon compared to UK nationals approaching Strasbourg or Latin Americans approaching Inter-American Court of Human Rights. As far as I know of very few cases of Canadians having approached Geneva Human Rights Council. Was it a vindication of the superior quality of justice being dispensed by the Supreme Court of Canada?

Prof. Roach: I think the UN Human Rights Commission is not as well-known as it should be and suffers from not being a court. People associate rights and remedies with

first rejecting the argument in 1990 the Supreme Court of Canada accepted in 2001 in *United States v. Burns and Rafay* 2001 SCC 7 that under the Charter we cannot extradite someone to face the death penalty. The European jurisprudence as well as comparative and Canadian experience with wrongful convictions played a role. I might also mention that I am starting a new book on the comparative study of wrongful convictions. A bad example of Canada not learning from European jurisprudence was when the Supreme Court of Canada left open in *Suresh v. Canada* 2002 SCC 1 , the possibility of deporting someone on national security grounds despite a risk of torture. We should have followed Europe's absolute ban on deportation to torture. I also think Canada should consider allowing cases from Canada to go the Inter-American Court of Human Rights. At present, complaints can only be made to the Inter-American Human Rights Commission but as I said, courts are often taken more seriously, especially when it comes to compliance with remedies. I think many Indigenous people in Canada would welcome a chance to litigate claims that fail or do not result in effective remedies in the San Jose court.

The AAL Magazine: Professor, is there a mechanism where Parliament of Canada peruses the state of Human Rights annually, Do you know of such a mechanism where Parliament has a specialized Committee to review the efficacy of the Canadian Bill of Rights.

Prof. Roach: We do not have a specialized committee though many Parliamentary committees do consider issues of compliance with human rights. Canada could benefit from its own Joint Committee on Human Rights which like the UK committee should be advised by independent counsel with expertise in human rights. This could provide an independent voice on human rights within Parliament. We should also loosen party discipline in our elected house as we have done in our unelected upper chamber. A Joint Committee on Human Rights could also follow up on compliance with various court decisions to ensure that remedies are really effective. As I say in my book, we live in a world rich in human rights but poor in remedies. The hard work of ensuring effective remedies belongs to us all- litigants, legislators, citizens, civil society as well as supra-national courts. Many thanks for this opportunity to share my thoughts.

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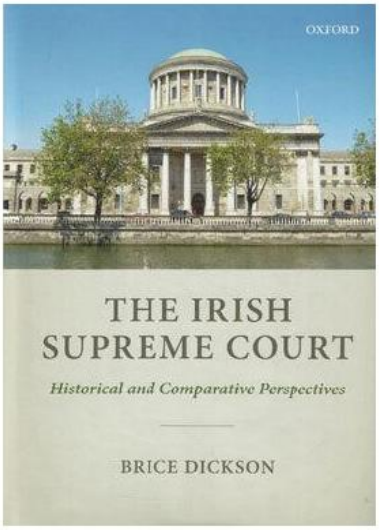
INTERVIEW- Emeritus Prof. Brice Dickson on the Supreme Court of Ireland



Brice Dickson is Emeritus Professor of International and Comparative Law at Queen's University Belfast, Northern Ireland. Having completed law degrees at the University of Oxford 1970s he was called to the Bar of Northern Ireland in 1976 and studied at the University of Paris II. He has taught at the Universities of Leicester and Ulster as well as at Queen's and has been a visiting professor at Fordham Law School, the University of New South Wales and the University of Melbourne.

A long-standing advocate for human rights, in 1981 Dickson helped to found a leading NGO in Northern Ireland (the Committee on the Administration of Justice) and at Queen's he co-established one of the UK's first Masters in Human Rights Law in 1989. From 1999 to 2005 he served as the first Chief Commissioner of the Northern Ireland Human Rights Commission, a statutory body created in the wake of the Belfast (Good Friday) Agreement of 1998. He also served as an independent member of the Policing Board of Northern Ireland from 2012 to 2020.

Besides *The Irish Supreme Court: Historical and Comparative Perspectives* (2019), Dickson's recent books include *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (co-ed, 2021); *Writing the United Kingdom's Constitution* (2019); *Electoral Rights in Europe: Advances and Challenges* (co-ed, 2017); *Human Rights in Northern Ireland: The CAJ Handbook* (co-ed, 2014); *Human Rights and the United Kingdom Supreme Court* (2013); and *The European Convention on Human Rights and the Conflict in Northern Ireland* (2010). His *International Human Rights Monitoring Mechanisms: A Study of their Impact in the UK* will be published at the end of 2022.

The AAL Magazine: Prof. Brice Dickson, it is our pleasure to feature you and your book on the Supreme Court of Ireland. You have delved deep into to the jurisprudence of the Irish Supreme Court

since 1924. Obviously you must have analyzed the corpus of jurisprudence built up over a very long period of time. What drove you to undertake this task?

Prof. Dickson: Having spent most of my working life as a legal academic in Northern Ireland, I had often been struck by how infrequently attention was given anywhere in the UK – or in the common law world more generally – to the legal system of the Republic of Ireland. I had written books and articles on the UK's top court, so I decided it would be interesting and useful to redress the balance (and a gap in the literature) by writing a scholarly book on Ireland's top court. The Supreme Court's workload had recently been greatly reduced through the creation of a lower tier Court of Appeal. With its centenary coming up in 2024, the time was right for an assessment of the Supreme Court's past and current effectiveness. I hope the book will bring the Irish Supreme Court's jurisprudence to the attention of a much wider audience of lawyers than has hitherto been the case.

The AAL Magazine: Before we go into the contours of constitutional jurisprudence, could you please elaborate on the influence of British legal principles in Ireland and whether Ireland – after independence in 1922 – has departed from adopting the English legal principles and tried to build up its own jurisprudence.

Prof. Dickson: Speaking very generally, Ireland has largely followed the contours of legal developments in the UK since 1922, whether legislative or judge-made, but it has also chosen its own path in several areas. Even when it has emulated British statues or jurisprudence it has usually done so not by slavishly following a British model but by producing its own custom-made laws based on distinctive reasoning. There are two good examples of this in the fields of negligence law and administrative law. Thus, the leading British case of *Donoghue v Stevenson* (1932), which firmly established the concept of a duty of care owed to one's neighbor, was not immediately applied in Ireland, but within 25 years Ireland's own case law was marching in parallel with it. And while the British decision in *Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) laid out the 'reasonableness' principle by which challenges to the legality of public authority decisions should be measured, Ireland has adopted a fairly similar approach without itself expressly following the British case. An area of law in which, until recently, Ireland lagged behind that of the UK is personal and family law. Divorce was not possible until 1995, transgenderism was officially accepted only in 2015 and abortion was not decriminalized until 2019. There is still no legislation on surrogacy nor, as in the UK, on assisted dying.

The AAL Magazine: I have come across some of the Irish Supreme Court cases where greater reliance had been placed upon American jurisprudence. Do you think this was due to adoption of the Irish Constitution as the supreme law of the land, as is the case with the US Constitution? Britain's doctrine of

parliamentary sovereignty seems somewhat outdated when it comes to constitutional governance. What reasons can you adduce for this departure in Ireland?

Prof. Dickson: When Ireland achieved its independence from the UK in 1922 it understandably wanted to cast off the laws dating from the colonial era and to develop its own legal system. The Constitution of the Irish Free State in 1922 envisaged that Ireland's future relationship with its former colonial power would be similar to that of Canada's, but the predominant view amongst the top judges remained that the status of the 1922 Constitution was not very different from that of an ordinary Act of the Irish Parliament (the Oireachtas). As time went on the influence of the US legal system began to grow. In the 1960s a close friendship between Judge Brian Walsh of the Irish Supreme Court and Justice William Brennan of the US Supreme Court undoubtedly influenced the former's approach to the solution of various legal disputes. In *The State (Quinn) v* Ryan Walsh stated that if the approach of any foreign court of final appeal was to be held up as an example for the Irish Supreme Court to follow it should be the US Supreme Court rather than the House of Lords in the UK.

There was a spate of judicial creativity in the Irish Supreme Court during the 1960s and 1970s which has not been mirrored since, the prime innovators being the trio of Justices Ó Dalaigh, Walsh and Henchy. Certainly Ireland's 1937 Constitution has been regarded as a hugely important document but, with the important exception of some 'unenumerated' rights which the Irish Supreme Court has 'discovered' within the text, it has not been subjected to the degree of judicial development which the US Constitution has attracted over the years. On the other hand, the Irish Constitution is, I am glad to say, much easier to amend than America's: in its 85-year history to date it has already been amended 32 times. And there are very few lawyers or judges who adopt an 'originalist' approach to interpretation of the Constitution.

The AAL Magazine: Professor, you have researched the period from 1922 to 1937 when Ireland had the status of a British dominion, and you have then looked at how the Supreme Court's jurisprudence shifted after the 1937 Constitution was adopted. Then the Irish Supreme Court enjoyed another fresh start when it was 'restructured' in 1961. Why did you divide your analysis of the Supreme Court's history into those three phases and how did the Court differ in each phase?

Prof. Dickson: Clearly the Supreme Court was still finding its feet during the 15 years of the first Constitution in 1922. That document reflected the dominion status of the country and contained no set of fundamental rights. It also allowed amendments to be made to the Constitution by ordinary Acts of the Oireachtas. The 1937 Constitution marked a whole new beginning for the

nation. Even though it was significantly influenced by Éamon de Valera's wish that the country should adhere to strict Catholicism, it also promoted basic civil liberties and embedded a stricter separation of powers between the Oireachtas, the government and the judiciary. The reforms it contained concerning the Supreme Court were not in fact implemented until the early 1960s, which is partly why it was the Justices of that decade and the next who began to modernize the Irish nation. After 1937 the Supreme Court did not consider itself bound by decisions it had made under the 1922 Constitution, even when the wording of the two Constitutions was similar. But the Court's overall approach remained a relatively conservative one, even after 1961, as illustrated most notably in its rejection in 1983 of a claim by a gay man, David Norris, that his right to a personal life was breached by the criminalization of homosexuality. Women, too, were badly served by the Court in its case law on abortion, especially in the *X* case in 1992. However, the judges were not unrepresentative of the nation as a whole, which in general remained reserved, religious and restrained.

The AAL Magazine: What were the changes and judicial attitudes that you found in your research after Ireland joined the European Union in 1973. How did it influence the Irish Supreme Court?

Prof. Dickson: Membership of the European Economic Community, and of its successor the European Union, was a crucial turning point in the modernizing of Ireland, certainly economically but also politically and socially. Constitutionally it meant that the Constitution of Ireland was expressly subordinated to laws made in Brussels and Luxembourg, a position which some other European countries, including Germany, had found difficult to accept. The Supreme Court, in the *Crotty* case (1987), played a prominent role in limiting the supremacy of European law by ruling that any future attempts to extend Ireland's commitment to European integration would need to be endorsed by a referendum approving a change to the country's Constitution. A quarter of a century later, in the *Pringle* case (2012) the Supreme Court rowed back a little on the *Crotty* principle when ruling that Ireland's joining of the European Stability Mechanism was not a matter that required approval in a referendum. To date there have been no fewer than nine referenda in Ireland on European issues. Future Supreme Court judges such as Donal Barrington, John Murray and Fidelma Macken gained valuable experience of European law while serving as judges in the Court of Justice in Luxembourg. Others, such as Nial Fennelly and Gerard Hogan served as Advocates General there. Brian Walsh was a part-time judge at the European Court of Human Rights while simultaneously serving as a Supreme Court Justice in Ireland.

The AAL Magazine: Can I assume that EU jurisprudence crept into Ireland long before UK adopted the Human Rights Act in 1998? Have you noticed a

remarkable shift in Irish jurisprudence between 1973 and 1998?

Prof. Dickson: No, it would be a mistake to assume that Ireland leapt ahead of the UK as regards the implementation of EEC / EU law. Both nations faithfully implemented the Regulations and Directives issued by the European institutions, referred issues for preliminary rulings from the European Court of Justice, applied the *acquis* (i.e. the settled case law) of that Court, and defended themselves against infringement proceedings brought by the European Commission (while accepting any adverse outcome in those proceedings). The implementation of European law was made more controversial in Ireland than in the UK because Ireland had a written Constitution which prescribed certain procedures that did not exist in the UK. The top courts of both nations upheld the rules relating to free movement of goods, services, capital and people. On numerous occasions they applied the strict standards of European discrimination law in the employment and service provision contexts. But because EEC / EU law has little to say about social and cultural issues such as divorce, homosexuality, abortion, adoption, surrogacy and assisted dying, it has had little or no influence on the development of Irish law in those domains. On all of those issues the UK's law has been more liberal than Ireland's.

The AAL Magazine: Has Ireland's jurisprudence on human rights developed along different lines from those in the jurisprudence of the UK?

Prof. Dickson: The UK allowed domestic courts to hear claims based on the European Convention on Human Rights (which of course does not derive from the EU but from the Council of Europe) when it enacted the Human Rights Act in 1998. Ireland followed suit more than five years later when it enacted the European Convention on Human Rights Act 2003. (The UK and Ireland were the last two of the Council of Europe's 47 states to domesticate the Convention.) The impact of the ECHR has been much more significant in the UK than in Ireland because in Ireland the ECHR, unlike EU law, is subordinate to the country's Constitution. So a claimant may argue that his or her rights under the ECHR have been breached by some piece of Irish legislation, but if the laws in question are not in breach of the Irish Constitution then no immediate remedy can be provided to the claimant. In other words, the Irish Supreme Court still bases its conception of human rights first and foremost on Articles of the Constitution. Only if a claimant who obtains no remedy domestically then takes the Irish government to the European Court of Human Rights in Strasbourg – and wins – will the Irish state have to provide a remedy. That is how homosexuality was eventually decriminalized in Ireland and it is how the law on vicarious liability for child sex molestation has needed to be changed too, following the European Court of Human Rights' ruling in *O'Keeffe v Ireland* in 2014.

Human rights are also protected by EU law, most notably through its 'general principles of law' (which protect the right of access to justice, for example) and through its various Directives on discrimination. UK courts will still have to apply those principles when they are interpreting 'retained EU law' (laws derived from the EEC / EU which have not been repealed in Britain, such as the Data Protection Act 2018), but Ireland's courts will not only have to apply those principles more generally but also the EU's Charter of Fundamental Rights. On some matters that Charter goes further than the ECHR, even though it applies only whenever Ireland is implementing EU law. For instance, it guarantees the right to access vocational and continuing training, to engage in work and pursue a freely chosen occupation and to not be discriminated against on the basis of genetic features.

The AAL Magazine: In your book you have stated that Irish Supreme Court has manifested a healthy degree of judicial activism and in some cases not as clearly or as imaginatively as might have been expected. What traditions was the Supreme Court trying to conserve?

Prof. Dickson: Again speaking generally, I think it is fair to say that the average Supreme Court Justice has been of a conservative disposition. They have tended to limit their role to that of deciding legal disputes rather than expanding it into that of making new laws for the future. The Constitution, after all, vests 'the sole and exclusive power of making laws' in the Oireachtas (Article 15.2.1). But, in a common law system, judicial decisions do set precedents which must be followed by lower courts. Since 1965 the Irish Supreme Court has, to its credit, adopted the view that it can refuse to follow one of its own previous decisions if it decides that it was 'clearly wrong' (an approach which was more or less mirrored by the UK's Appellate Committee of the House of Lords a year later), but it still displays a reluctance in trespass on to territory which it deems best left to elected politicians. The much-lamented Judge Adrian Hardiman – often referred to as Ireland's equivalent to Justice Antonin Scalia – was particularly adamant that judges should not set rules in the area of social and economic rights. The last three Chief Justices – Susan Denham, Frank Clarke and Donal O'Donnell – have been slightly more prepared than their predecessors to engage in judicial activism, but the majority of Supreme Court judges are still most reluctant to create new rights. The traditions they are conserving are those of judicial restraint, respect for the Constitution and, as they would see it, deference to the rule of law.

For a while the Supreme Court toyed with the view that some disputes could justifiably be decided in accordance with 'natural law', a concept which for the first Chief Justice of Ireland, Hugh Kennedy, was really a euphemism for traditional Catholic morality. Today, thankfully, the religious dimension to what appears to be 'natural' reasoning has disappeared from Supreme Court judgments. References to

the 'special position' of the Catholic Church and to other denominations were removed from the Constitution in 1979, although, rather alarmingly, Article 41.2.2 still requires the state to 'endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home'.

The AAL Magazine: As you are well aware, there have many decades of sectarian violence in Northern Ireland and in some cases militant activities were planned within the Republic but conducted in Northern Ireland. There have been several terrorism cases decided by the Supreme Court of Ireland. Have you found any departure in Ireland from treating these sensitive cases in terms of applying the law as rigorously as is done in UK?

Prof. Dickson: The Irish courts have rigorously applied Irish law to instances of Irish terrorism. As in Northern Ireland they have removed the right to jury trial from some defendants associated with unlawful paramilitary organizations, but they have created instead a 'Special Criminal Court' consisting of three judges, whereas in Northern Ireland a single judge hears such cases, with an automatic right of appeal to an appeal court comprising three judges. The Special Criminal Court is also used in some non-terrorist cases, such as trials of defendants charged with serious organized crime. Where there is a question mark over the Irish Supreme Court's approach to terrorism cases is in its case law concerning the extradition of terrorist suspects to Northern Ireland. During most of the period of the 'troubles' in Northern Ireland (1969 to 1998) the Supreme Court was reluctant to authorize extradition because of fears that in Northern Ireland the suspect might by mistreated by police or prison officers or not receive a fair trial. At least two of the Justices were inclined to the view that members of the IRA should not be extradited because their actions (even murders) qualified as 'political offences'. Judge Brian Walsh veered in that direction when refusing to extradite Dermot Finucane in 1990. Once the European Arrest Warrant system was introduced in 2002, extradition problems faded away, but Brexit has meant that the UK is no longer able to make use of that system so problems may arise again in the future. Politically motivated violence is still a frequent occurrence in Northern Ireland, as evidenced by the 'New' IRA's murder of a young female journalist, Lyra McKee, in Derry in 2019.

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SPECIAL REPORT ON THE LAW OF EXTRADITION JULY 2022

Extradition between the nation states has always been a controversial issue. The reason being that handing over a citizen to another country for his or her trial would be a deeply sensitive political matter hence all factors must be taken into account. If an offence committed by a citizen in a foreign territory is not recognized in the home country of the citizen, the issues might surface as to the justifiability of sending a person who enjoys constitutional rights in the home country and the absence of which in the requesting country. If the citizen is handed over to a foreign country he should be subject to a proper trial and whether he would get justice for the crime committed and if the punishment is proportionate to the crime committed are hugely politically controversial issues. If an American citizen is wanted by the Kingdom of Saudi Arabia it would definitely lead to a clash of jurisdictions and constitutional rights of the American citizen who would otherwise enjoy constitutional rights under the American Government. If he is sent to the Kingdom of Saudi Arabia he would be subject to Sharia Law. If the American Government hands him over to the Kingdom of Saudi Arabia the American national would be deprived of his rights under the American Constitution. He would be left with no remedies in Saudi Arabia. This is a clear case of how diplomacy, the letter and spirit of the comity of nations, parity, reciprocity, dual criminality, constitutional and human rights, and due process of law issues would surface. The diplomatic and foreign relations between U.S and Saudi Arabia have been a steady one for many decades and Saudi Arabia is in fact protecting the economic interests and defense

posture of the United States. A refusal to extradite an American to Saudi Arabia would certainly damage the close political relations between the two nations. If an American citizen is required by North Korea it would not certainly take place. The economic relations with Saudi Arabia trumps fundamental human rights enjoyed by a citizen of the United States. The economic interest with the Government of Saudi Arabia is unfathomable by any standards. The United States would be hard pressed to ignore demands by the Government of Saudi Arabia; hypothetic though this sounds but for our legal analysis, one must truly look into the extent of economic relations U.S has committed to Saudi Arabia. There are issues that would threaten the national security interests of the United States.

FBI report implicates Saudi Government

The *USA Today* newspaper reported that the Government of Saudi Arabia almost certainly helps citizens accused of serious crimes to escape from U.S. The FBI report,[1] which had since been declassified, says that the Saudi Government undermines the U.S. Judicial process by assisting with escape of citizens accused of offenses ranging from traffic violation to more serious felonies like rape, child pornography and manslaughter. Whether this happens with the tacit approval of the Government or whether it is something to do with corrupt officials of the Foreign Service is not yet established. The Report also says that Saudi Government does this to avoid embarrassment of Saudi citizens enduring the U.S judicial process and is not likely to change the practice without pressure from the U.S. This case is illustrated to provide a glimpse of the intricacies and difficulties of seeking extradition of fugitives from foreign governments. The extradition is more complicated than what meets the eye. If the offence is political in nature it has different connotations. The ambiguities on the meaning of what constitutes a 'political offence' are subject to different interpretations given the existing political climate of a country and the offence borne out of the perception by the regime in power and its ideological origins does matter a lot. The ideological origins of Nazi regime under Hitler in Germany ended up persecuting Jews in Germany in open defiance of logic and morality. Could Nazi Germany be identified as being a country which is properly governed by the accepted norms and standards? Could a Jew be deported to Nazi Germany where Jews have been subjected extreme violence by the State?

Branding the criminals.

Professor Baroness Christine Van Den Wijnegaert, [2] a Judge of the International Criminal Court postulated an interesting theory in one of her research papers. She claimed that during late Twenties and Thirties political offenders claimed asylum in a general atmosphere of rising totalitarianism, brought a new profile of political offenders such as 'fascists' 'communists' who, in combatting each other's, used methods which could easily be compared to contemporary 'terrorism'. At the conclusion of the Second World War, two totally different generations of political offenders arose: on one hand the so called 'regime collaborators', 'quislings' who betrayed

[1] Nicolas Wu, 'FBI: Saudi government 'almost certainly' helps citizens accused of serious crimes escape from US' *The USA Today*, https://www.usatoday.com/story/news/politics/2020/01/18/fbi-saudi-government-helps-citizens-accused-crimes-escape-us/4510454002/ accessed 27 May 2022

[2] Professor Baroness Christine Van Den Wijnegaert , 'The Political Offence Exception to Extradition', Report presented at the International Seminar on Extradition, International Institute of Higher Studies in criminal Sciences. Noto, JJune, 1983

the country by helping the invading Nazi forces especially in Norway, claimed to be purely political offenders. How could one country honor the request for extradition of this type of political offenders?

The Prison standards had been a matter of discussion at the Commonwealth Law Ministers Conference held in 1996 in Malaysia. Could a citizen be extradited to a country where there are recurrent issues with the prison management? The track record of the country is equally important and this has a bearing on how previous extraditions have been dealt with and whether country has backtracked on assurances given to countries from where fugitives have been transferred. Has the requesting country stuck to the commitments it had given? Has the requesting country ensured due process of law for the fugitives who have been handed over? This need not be from the same country it can have a bearing on how the requesting country has dealt with fugitives who had been brought down from other countries.

The Guardian Newspaper of UK had reported that Wikileaks founder Julian Assange was refused extradition to US.[3] The British court ruled against the U.S extradition request due to concerns that his health and safety could not be assured in US custody. The Judged reasoned that the significant risk exists that he would be placed in solitary confinement which the Judge concluded would likely to lead to his death by suicide. Assange seems to have had documented history of mental illness hence the Court held that his condition would likely lead to his death by suicide. However this has since been reversed, Mark Summers QC who appeared for Assange had requested the Home Secretary to review the extradition approval by the Court. [4]

Judicial Independence a key to a fair trial

The Judicial independence of the requesting country does have a huge impact on whether the fugitive would receive justice. This has a direct bearing on the Political Exception Doctrine though the doctrine touches on the nature of the crime but judicial independence has more to do with the nature of justice expected from the requesting country especially if there had been issues of judicial independence. It is important to scrutinize whether the Judiciary of the requesting country has the required independence to make decisions without the fear of being penalized for any adverse decision that goes against the political priorities and agendas of the government in power.[5] It is also important to find out if the Constitution of the requesting country provides the required independence for judges. An important question that must be kept in mind is whether the Judiciary of the requesting country has had a good track record in maintaining judicial independence. Has there been any impropriety of the Judges of the requesting country. Extradition of a citizen to another country is a serious matter to be left for the discretion of a foreign judge who would seek his promotion by dispensing a judicial decision in a jungle. Does

[3] *The Guardian* Newspaper, https://www.theguardian.com/media/2022/mar/14/julian-assange-denied-permission-to-appeal-against-us-extradition accessed 27 May 2022

[4] Dominic Casciani ' Julian Assange's US extradition order sent to Priti Patel for final approval ', BBC News, https://www.bbc.com/news/uk-61162908 accessed 27 May 2022

[5] For a broader discussion on the Judicial Independence of the requesting state, please refer to Tracey Hughes *Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual* , Boston College International and Comparative Law Review. https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1404&context=iclr accessed 27 May 2022

the requesting country have a clear history of having never meddled in the affairs of judiciary? Does the track record of the judiciary in the requesting country provide a conducive environment for a proper trial for the fugitive? How is the independence of Judiciary quantified or measured especially when there are allegations of interference with the media freedom of the requesting state? Could a Judge expect a promotion from the political authorities if a judgment is rendered to benefit the political authorities? In Argentina there have been cases where Judges have defected to the side o political authorities out of fear or seeking a political favor. [6] The Political Offence Doctrine needs further scrutiny to identify if the doctrine should go beyond the political ambience of a nation state where a fugitive could really expect justice. Could the fugitive be left in the custody of the requesting state where there have been past incidents of reckless behavior by the officials of the law enforcement branches? Could there be a very high risk of the fugitive being inconvenienced by the requesting state at the risk of being harmed even though there is a preponderance of evidence against the fugitive? There needs to be an internationally accepted norm on the Political Exception Doctrine. The core issues of political exception must transcend its traditional considerations and encompass a whole gamut of issues viz., the capacity of the requesting state to provide security guarantees for the fugitive, the extent of the independence of judiciary and the general political ambience of the requesting state is a matter to be considered by the compliant state. It would also be appropriate to look into the motives of the request for the return of the fugitive to the country where he is sought and whether it would ultimately be used for a collateral purpose such as augmenting the re-election chances of the requesting government or whether it has any other motive other than the purpose of bring the fugitive to justice. Has the requesting state complied with the requirement of Bangalore Principles of Judicial Conduct or are there any visible signs of compliance.

Yet another dimension is whether requesting country has the effective government. What is the level of governance exhibited by the country and the approval ratings of the Government by the civil society agencies and populace at large. Does the fugitives request by the Country have any bearing on re-election chances and cushioning effect on the approval ratings if ratings are dipped but fugitive's – especially if he or she is a controversial figure - presence could enhance the approval ratings? Could the fugitive be used as an instrument of public relations or media stunt? A matrix based on law and politics on this can very well be worked out before a fugitive is handed over to another country.[7] Provisions of the ICCPR is yet another important factor that must be taken into account. If the requesting state has not ratified the ICCPR and if the provisions of the ICCPR had not been introduced to the municipal law of the requesting state, the extradition of fugitive may be halted as there is no guarantee that the fugitive would face justice in the requesting state.[8]

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[6] Gretchen Helmke, *Courts Under Constraints, Judges, Generals and Presidents in Argentina*, Cambridge University Press, 2005, p.17, 20, 34, 95, 157 and 168,

[7] Douglas M. Gibler, Kirk A. Randazzo 'Testing the Effects of Independent Judiciaries on the Likelihood of Democratic Backsliding', American Journal of Political Science, Vol. 55, No. 3, July 2011, Pp. 696–709

[8] Ann Powers, 'Justice Denied The Adjudication of Extradition Applications ' Texas International Law Journal, 2002, p.296

SPECIAL MESSAGE TO THE PRESIDENT OF THE UNITED STATES OF AMERICA JOE BIDEN ON NATIONAL SECURITY OF CANADA, UK, NATO, ISRAEL, INDIA, AUSTRALIA AND NEW ZEALAND

Dear Mr. President,

The invention of hypersonic missiles by the perceived enemies of the United States would be a huge national security concern. The speed with which they are delivered will wreak havoc resulting in breaking the constitutional order of the United States which it had cherished for two centuries. The attack on the U.S. satellite communication facilities in space could be the first strike option against the U.S. It could cut off the President of the U.S from the Nation, from the Military Commanders and the civil government as a result you will not be able to communicate with U.S allies viz., Canada, UK, Europe/ NATO, Israel, Japan, India, Australia, New Zealand, and elsewhere. Your position as Commander-In-Chief of the U.S forces would be meaningless if you are unable to communicate with the Nation. The key allies of the U.S., would lose confidence in your ability to wage a coordinated battle against the perceived enemies. The authoritarian regimes in the World would feel triumphant and forge new strategic alliances.

We, KC – The King's Counsel Magazine, call upon you to immediately appoint a Presidential Commission to inquire into the efficacy of the U.S constitution and whether it should be suitably revised or amended to deal with the new threats. This will ensure that the security of the strategic allies of the U.S too is guaranteed in case such an eventuality takes place.

God Bless America

OVER TO YOU MR. PRESIDENT

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